DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 02-0433
SALES AND USE TAX
For Years 1999 and 2000

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ISSUES

I. Sales & Use Tax – Public transportation exemption

Authority: IC 6-2.5-5-27; *Panhandle Eastern Pipeline Co. v. Indiana Dept. of State Revenue*, 741 N.E.2d 816 (Ind. Tax Ct. 2001); *Indiana Waste Systems of Indiana, Inc. v. Indiana Dept. of State Revenue*, 644 N.E.2d 960 (Ind. Tax Ct. 1994).

Taxpayer protests the imposition of gross retail tax on purchases made that, in the opinion of taxpayer, fall under the public transportation exemption.

STATEMENT OF FACTS

Taxpayer is in the grain-handling business. Its activities include, but are not limited to, the drying, storing, and hauling of grain. Taxpayer is also engaged in the purchase and resale of grain, lime, rock, chemicals, and fertilizer. A significant portion of taxpayer's revenue is derived from the transportation of tomatoes for a third party.

DISCUSSION

I. Sales & Use Tax – Public transportation exemption

Taxpayer believes that the transactions in question are exempt from state gross retail tax under IC 6-2.5-5-27. This statute provides that transactions involving personal property and services are exempt from the state gross retail tax if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property. IC 6-2.5-5-27. Taxpayer is attempting to apply this statute to transactions that concerned its truck hauling activities.

In *Panhandle Eastern Pipeline Co. v. Indiana Dept. of State Revenue*, 741 N.E.2d 816 (Ind. Tax Ct. 2001), the court set out what the Department extrapolates to be a two-pronged test to determine if a particular business qualifies for the public transportation exemption. The language used by the court in *Panhandle* reads as follows:

> If a taxpayer acquires tangible personal property for predominate use in providing public transportation for third parties, then it is entitled to the exemption. If a taxpayer is not predominately engaged in transporting the property of another, it is not entitled to the exemption.

The two-pronged test the Department extrapolates is as follows:

1. The taxpayer must be predominately engaged in public transportation of the property of another; and
2. The taxpayer's property must be predominately used for providing public transportation.

The Department conceded that taxpayer meets the second prong of the test; the equipment at issue is predominately used for the provision of public transportation. This protest concerns the first prong of the test; namely whether or not taxpayer is *predominately engaged* in public transportation of another (emphasis added). *Panhandle* stands for the notion that the taxpayer is either entitled to a complete exemption from taxation or no exemption at all – there are no partial exemptions.

In this instance, the key analysis to be undertaken then is, at what point does a taxpayer's business become predominately engaged in public transportation? The Department and the taxpayer give very different yet plausible measuring sticks that reach different results.

The Department contends the benchmark should be the taxpayer's gross income. In the tax years in question, taxpayer's gross income from the transportation of the property of another as compared to its total revenues from all activities was 24% and 21% respectively.

On the other hand, taxpayer contends the true measure of its business is "transportation miles traveled." This factor looks solely at the number of miles that the trucks were used for hauling and takes the miles traveled for the benefit of another and compares it with total miles hauled. In 1999 and 2000, those ratios were 82% and 72% respectively.

The figures from which these ratios are derived, in both situations, are uncontested. It is also uncontested that if the Department's analysis is accepted, the taxpayer is not exempt; whereas if the taxpayer's analysis is accepted, it would be exempt.

The Court in *Panhandle* doesn't give any clear guidance as to what factors should be considered when determining if a taxpayer's business is predominately engaged in public transportation. As it is, the potential factors are virtually limitless.

The Department's position rests upon an analysis of the taxpayer's hauling business for others as a function of its overall business activities (e.g. the selling of grain produces revenues that, though unrelated to the process of hauling, are factored into the analysis). Alternatively, taxpayer's position rests upon an analysis of the taxpayer's hauling business for others as a function of its overall hauling business, absent any consideration of its

other business activities (i.e. any revenues from activities such as the selling of grain are completely ignored).

The statute in question (IC 6-2.5-5-27) makes no reference to the business of the taxpayer as a whole. An argument could be made, however, that the first prong of the *Panhandle* test requires such an analysis. In *Indiana Waste Systems of Indiana, Inc. v. Indiana Dept. of State Revenue*, 644 N.E.2d 960 (Ind. Tax Ct. 1994), the court found against the taxpayer because its public transportation revenue equaled 17.7% or less of its gross revenue on a yearly basis:

> Waste Management's maximum annual revenue from public transportation was 17.7 percent of its total revenue, and therefore, the remaining 80 plus percent of its revenue came from non-public transportation.

In finding that the taxpayer was not entitled to the public transportation exemption, the court analyzed the business of a taxpayer that was exclusively in the transportation business. The case turned on whether or not the equipment was "predominately used" in public or non-public transportation. And while that issue is not contested here, the analysis is still relevant for determining whether or not a taxpayer is "predominately engaged" in the transportation of property of another.

Taxpayer's "miles traveled" position serves taxpayer well in satisfying the second (predominately used) prong of the public transportation test. Through it, taxpayer has demonstrated that when its trucks are used to haul property, about three times out of four it does so with a third party's property. This shows that taxpayer's equipment is "predominately used" in public transportation. But the Department is in agreement on this issue, and it does nothing to show that taxpayer is "predominately engaged" in the business of public transportation.

The plain language of *Panhandle* is that the taxpayer must be predominately engaged in the transportation of the property of another. For one to be predominately engaged in something implies a look at the big picture – are the majority of taxpayer's activities considered public transportation? The answer, in this instance, is no.

During the tax years in question, taxpayer never reported more than 24% of its income from activities deemed to be public transportation. The majority of its income – the bulk of the remaining 76% - comes from the selling of grain and other related activities. Therefore, taxpayer is more appropriately classified as being predominately engaged in grain sales, not public transportation, and therefore taxpayer fails the first prong of the test.

FINDINGS

The taxpayer is respectfully denied.

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